

**UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA**

LOGISTICAL SOLUTIONS, LLC.,

Plaintiff,

v.

FS SOLUTIONS,

Defendant.

Case No. 2:14-cv-01011-LDG (PAL)

**ORDER**

The plaintiff, Logistical Solutions, LLC., filed suit against the defendant, Guzzler Manufacturing, Inc., dba FS Solutions (erroneously named as FS Solutions). Logistical Solutions alleges it purchased a truck with a vacuum system from Guzzler, but that the truck is defective. Logistical Solutions alleges claims for breach of express warranties, breach of implied warranties, breach of contract, and breach of the implied covenant of good faith and fair dealing. Guzzler moves to dismiss the latter three claims (#6), arguing the second claim fails because the purchase agreement specifically excluded any implied warranties, and the third and fourth claims fail because the agreement required claims to be brought within one-year. Logistical Solutions opposes the motion (#8). Having read and considered the pleadings, papers, and arguments of the parties, the Court will dismiss the second claim but will otherwise deny the motion.

1 Motion to Dismiss

2       The defendant's motion to dismiss, brought pursuant to Fed. R. Civ. P. 12(b)(6),  
3 challenges whether the plaintiff's complaint states "a claim upon which relief can be  
4 granted." In ruling upon this motion, the court is governed by the relaxed requirement of  
5 Rule 8(a)(2) that the complaint need contain only "a short and plain statement of the claim  
6 showing that the pleader is entitled to relief." As summarized by the Supreme Court, a  
7 plaintiff must allege sufficient factual matter, accepted as true, "to state a claim to relief that  
8 is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007).  
9 Nevertheless, while a complaint "does not need detailed factual allegations, a plaintiff's  
10 obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels  
11 and conclusions, and a formulaic recitation of the elements of a cause of action will not do."  
12 *Id.* at 555 (citations omitted). In deciding whether the factual allegations state a claim, the  
13 court accepts those allegations as true, as "Rule 12(b)(6) does not countenance . . .  
14 dismissals based on a judge's disbelief of a complaint's factual allegations." *Neitzke v.*  
15 *Williams*, 490 U.S. 319, 327 (1989). Further, the court "construe[s] the pleadings in the  
16 light most favorable to the nonmoving party." *Outdoor Media Group, Inc. v. City of*  
17 *Beaumont*, 506 F.3d 895, 900 (9th Cir. 2007).

18       However, bare, conclusory allegations, including legal allegations couched as  
19 factual, are not entitled to be assumed to be true. *Twombly*, 550 U.S. at 555. "[T]he tenet  
20 that a court must accept as true all of the allegations contained in a complaint is  
21 inapplicable to legal conclusions." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "While  
22 legal conclusions can provide the framework of a complaint, they must be supported by  
23 factual allegations." *Id.* at 679. Thus, this court considers the conclusory statements in a  
24 complaint pursuant to their factual context.

25       To be plausible on its face, a claim must be more than merely possible or  
26 conceivable. "[W]here the well-pleaded facts do not permit the court to infer more than the

1 mere possibility of misconduct, the complaint has alleged—but it has not ‘show[n]’—‘that the  
2 pleader is entitled to relief.’” *Id.* (citing Fed. R. Civ. P. 8(a)(2)). Rather, the factual  
3 allegations must push the claim “across the line from conceivable to plausible.” *Twombly*,  
4 550 U.S. at 570. Thus, allegations that are consistent with a claim, but that are more likely  
5 explained by lawful behavior, do not plausibly establish a claim. *Id.* at 567.

6 Breach of Implied Warranty

7 In its second claim for relief, Logistical Solutions alleges that Guzzler breached its  
8 implied warranties “by not providing a Truck that was merchantable and fit for its purpose.”  
9 Guzzler argues that the purchase agreement excluded implied warranties, and specifically  
10 provided that this exclusion applied to “the implied warranties of fitness for a particular  
11 purpose and merchantability.” Pursuant to Illinois law (which the agreement indicates  
12 would govern disputes), the exclusion of the implied warranties of fitness for a particular  
13 purpose and merchantability must be conspicuous, and the exclusion of an implied  
14 warranty of merchantability must mention merchantability.

15 Logistical Solutions does not offer any argument in response to Guzzler’s argument  
16 that it is entitled to dismissal of the second claim for relief. Logistical Solutions does not  
17 contest that its agreement with Guzzler contained language excluding implied warranties,  
18 that the language mentioned merchantability, and that the language was conspicuous.  
19 “The failure of an opposing party to file points and authorities in response to any motion  
20 shall constitute a consent to the granting of the motion.” Local Rule, 7-2(d). The lack of  
21 any points and authorities in Logistical Solutions’ opposition that are relevant to Guzzler’s  
22 arguments that the claim for breach of implied warranties should be dismissed constitutes  
23 its consent to the dismissal of that claim.

1        Breach of Contract, and Breach of Implied Covenant of Good Faith and Fair  
2        Dealing.

3        Guzzler argues, and Logistical Solutions does not dispute, that parties may agree to  
4        reduce a limitations period for contract claims to one year. Guzzler further argues, and  
5        Logistical Solutions does not contest, that the purchase agreement expressly limited the  
6        limitations period to one year, providing that “no action regardless of form, arising out of the  
7        transactions of the [sic] agreement may be brought by Purchaser more than one year after  
8        the cause of action has accrued.”

9        Guzzler contends that Logistical Solution’s claim—that Guzzler agreed to sell a new  
10       truck, but the truck sold to Logistical Solutions was not new—accrued in July 2012. Guzzler  
11       notes that Logistical Solutions alleges, in its complaint, that it took possession of the truck  
12       in Alabama on July 13, 2012, and discovered it was not new upon arrival in Las Vegas.  
13       Guzzler argues that this discovery must have occurred in July 2012, and therefore the  
14       limitations period expired in July 2013. However, Logistical Solutions filed its claims in  
15       February 2014. Accordingly, Guzzler concludes that Logistical Solutions’ third and fourth  
16       claims are untimely and barred as filed outside the limitations period.

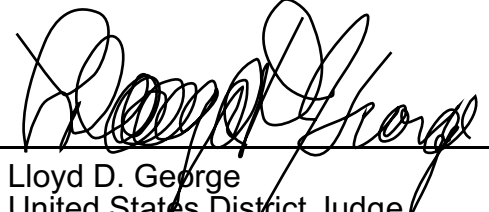
17       The argument fails because Logistical Solutions’ claims against Guzzler do not, as  
18       argued by Guzzler, rest solely upon the discovery, in July 2012, that the truck was not new.  
19       Rather, Logistical Solutions also alleges that Guzzler breached its contract by “failing to  
20       repair, replace, or adjust defects/malfunctions of the Truck. . . .” Nothing in the complaint  
21       compels the Court to conclude that the alleged failure to repair, replace, or adjust defects  
22       or malfunctions of which Logistical Solutions complains accrued prior to February 27, 2013.

23       Accordingly, for good cause shown,

24       THE COURT **ORDERS** that Defendant’s Motion to Dismiss (#6) is GRANTED in part  
25       as follows: Plaintiff’s Second Claim for Breach of Implied Warranties is DISMISSED;  
26

1 THE COURT FURTHER **ORDERS** that Defendant's Motion to Dismiss is otherwise  
2 DENIED.

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4 DATED this 30 day of March, 2015.

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7 Lloyd D. George  
8 United States District Judge  
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